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In The

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

~~**MOTION OF PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE**~~
BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND BRIEF FOR PROFESSORS OF INTERNATIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION OF PROFESSORS OF INTERNATIONAL LAW FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of this Court, Professors of International Law respectfully move the Court for leave to file a brief of *amici curiae*. Counsel for Respondents have granted consent for this submission. While consent was sought from Counsel for Petitioners, *Amici* did not receive a final decision from them on whether they granted consent.

This *amici curiae* brief is submitted by 25 law professors who teach international law, with many emphasizing international human rights law. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. These professors wish to emphasize the importance of allowing victims of torture, extrajudicial killing, and forced disappearances to pursue their claims in U.S. courts pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note), and as authorized by this Court in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004).

This Court's previous rulings make clear that claimants should normally be allowed to pursue their claims and to collect their judgments under U.S. law, and that assertions of sovereign immunity should be resolved by applying neutral, well-established legal

principles rather than political considerations. The Respondents are entitled to collect on their judgment through the present interpleader action for four reasons: (1) because the Republic of the Philippines previously urged U.S. courts to provide a venue for their claims; (2) because the Republic has made no effort to provide compensation to the members of the Class of Human Rights Victims in the Philippines; (3) because the Republic has provided no evidence whatsoever that it is entitled to the interpleaded assets; and (4) because treaties that the United States and the Philippines are parties to confirm that countries must provide effective remedies to victims of grave human rights abuses.

Given their expertise, *Amici* would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations. *Amici* have filed a joint brief to reduce multiple filings with the Court. Moreover, *Amici* seek to avoid repeating arguments made by the parties.

For these reasons, *Amici* respectfully request that the Court grant this motion for leave to file.

Dated: February 26, 2008

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

This *amicus curiae* brief is respectfully submitted by twenty-five law professors who teach in the fields of international law and human rights law.[1] They urge this Honorable Court to affirm the ruling of the Ninth Circuit Court of Appeals and thus allow for funds to be distributed to the members of the Class of Human Rights Victims in partial payment of the judgment issued in their favor in the underlying case. Such a result would not only provide direct benefit to the Class members but would also serve to protect the human rights of individuals all over the world by confirming that the independent courts of the United States will apply and enforce the rule of law in an even-handed manner.

There are twenty-five law professors joining in the filing of this brief.[2]

S. James Anaya, James Lenoir Professor of Law and Human Rights, James E. Rogers College of Law, University of Arizona, Tucson, Arizona.

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no person or entity other than *amici curiae* and The JEHT Foundation made any monetary contribution to the preparation or submission of the brief. *Amici curiae* also state that Professor Jon M. Van Dyke, who is one of the counsel for the Class Human Rights Victims, assisted with the preparation of this brief. The printing costs for this brief were paid by The JEHT Foundation. Pursuant to Rule 37.3, *amici curiae* sought consent from both parties to file this brief. Counsel for Respondents granted consent for this submission. While consent was sought from Counsel for Petitioners, *Amici* did not receive a final decision from them on whether they granted consent.

[2] Affiliations listed for informational purposes only.

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Amici are experts in matters of international law and human rights law. They would like to provide this Honorable Court with an additional perspective on these issues. They believe this submission will assist the Court in its deliberations.

STATEMENT OF THE CASE

This appeal of an interpleader judgment concerns an attempt by the Class of Human Rights Victims in the Ferdinand E. Marcos Human Rights Litigation to collect a portion of the judgment awarded in 1995 to the Class and affirmed as a final judgment on appeal in 1996. The Victims were tortured, disappeared, or summarily executed during the 1972-86 martial law regime of Ferdinand E. Marcos in the Philippines. The case was brought pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note). To prevail, the Victims had to satisfy numerous requirements and establish their injuries to a federal court jury in litigation that was contested at every point by the attorneys representing Marcos (and later his Estate). The collection process has been difficult. In the present interpleader action, the Victims were awarded the assets from a Merrill Lynch Account (Arelma assets) established by Marcos in 1972.

The rulings by the trial and appellate courts in this litigation have confirmed and clarified many important principles related to the protection of

fundamental human rights. These rulings have generated an extensive literature and have been analyzed in numerous law review articles, books, and casebooks.[3] The rulings by the Court of Appeals affirming the verdicts in favor of the Human Rights Victims have been cited by more than 100 other opinions during the past decade.

The present interpleader was brought to resolve ownership of a Merrill Lynch account established by Ferdinand E. Marcos in 1972. After years of hotly-contested discovery and a bench trial, the trial court awarded the account, which had grown to about

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[3] *See, e.g.*, Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1989: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995); Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANS. LAW 325 (1998); Riza DeJesus, *Retroactive Application of the Torture Victim Protection Act to Redress Philippine Human Rights Violations*, 2 PAC. RIM LAW & POL. J. 319 (1993); Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad*, 14 B.C. THIRD WORLD L.J. 43 (1994); Sol Schreiber and Laura D. Weissbach, *In re Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 LOY. L.A. L. REV. 476 (1998); Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773 (2000); Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE LAW JOURNAL 169-93 (2001) (University of the Philippines); WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 119-25 (2007).

$35,000,000 at the time of trial, to the Class of Human Rights Victims. The Republic of the Philippines challenged this ruling, arguing that it could not be required to participate in the interpleader action because it had sovereign immunity, and the interpleader action could not be conducted by the U.S. courts because it was an indispensable party. The Court of Appeals affirmed the trial court's verdict, confirming the district court's conclusion that the Republic was not an indispensable party because it had virtually no chance of establishing its claim to the disputed assets and hence the interpleader was an adequate method of assigning ownership of the account and protecting Merrill Lynch against conflicting claims. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 464 F.3d 885 (9th Cir. 2006).

SUMMARY OF ARGUMENT

This Honorable Court should affirm the ruling of the Court of Appeals that the Republic of the Philippines and its Presidential Commission on Good Government (PCGG) are not indispensable parties under Rule 19(b) of the Federal Rules of Civil Procedure and, therefore, the Arelma assets should be awarded to the Class of Human Rights Victims. The members of this Class were victims of torture, extrajudicial killing, and forced disappearances during the

1972-86 martial law regime of Ferdinand E. Marcos in the Philippines. They pursued this action under the Alien Tort Statute and the Torture Victim Protection Act with the active encouragement of the Republic of the Philippines, as evidenced by its 1987 *amicus curiae* brief. During the interpleader action, no evidence whatsoever was offered that would support the position of Petitioners that the Arelma assets belonged to the Republic of the Philippines nor was any offer of proof made to support that position. The district court evaluated the evidence in the record and ruled that the assets belonged to the Marcos Estate, and this was affirmed by the Court of Appeals. The members of the Class of Victims followed the course of action recommended by the Court of Appeals in its 1996 opinion, *In re Estate of Ferdinand Marcos Human Rights Litigation,* 94 F.3d 539, 547 (9th Cir. 1996), and they should now receive partial collection of their judgment.

Neither the United States, in its *amicus curiae* brief, nor Petitioners in their brief, have identified any significant impact on foreign relations that will occur if the Court of Appeals decision is affirmed. No such result can be expected because the Philippines and the United States have worked with other nations to recognize that countries should provide forums to allow victims to bring claims against those who commit grave human rights abuses. The members of the Class of Human Rights Victims could bring their claim against Marcos only in the U.S. District Court for the District of Hawaii because

Marcos was living in Honolulu and this was the only court that had personal jurisdiction over him. The Republic of the Philippines has made no effort whatsoever to provide any compensation for the Victims despite its obligation to do so under international law.

This Court has explained that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). The lower courts followed this instruction and applied Rule 19(b) of the Federal Rules of Civil Procedure, evaluating the impact of the award on the Republic in light of the statute of limitations barring its claim, and concluded that the interpleader proceeding was fair and adequate for all parties. This ruling should be affirmed.

ARGUMENT

I. THE JUDGMENT AWARDED TO THE CLASS OF HUMAN RIGHTS VICTIMS IN THE CASE UNDERLYING THE PRESENT INTERPLEADER WAS BASED ON PRINCIPLES APPROVED BY THIS HONORABLE COURT.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Honorable Court examined the history behind the enactment of the Alien Tort Statute, explaining that it was designed to provide jurisdiction over

claims asserting violations of the law of nations, and was enacted on the understanding that the federal courts would recognize a common law cause of action for certain violations of the law of nations. This Court pointed to three torts recognized in the late eighteenth century as violating the law of nations – piracy, assaults on diplomats, and violations of safe passage – and held that modern courts should recognize causes of action for torts that gained the same wide acceptance and had the same specificity as the three torts that existed at the time of the statute's enactment. The Court's opinion noted that Congress intended this statute to have a "practical effect" of allowing foreigners to bring claims in U.S. courts for "international law violations with a potential for personal liability," *id.* at 719, 724, in order to promote the overall goal "'that the peace of the world may be maintained.'" *Id.* at 723 (*quoting* 4 BLACKSTONE, COMMENTARIES 68). This Court cited with approval the approach and analysis taken by the federal courts in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in the case underlying the present matter, *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994), which both examined international law documents and precedents in detail to conclude that torture and extrajudicial killing violate fundamental norms of international law and that these concepts had been defined with specificity. The *Sosa* opinion also recognized that when Congress enacted the Torture Victim Protection Act, it confirmed that U.S. federal courts should permit "federal

claims of torture and extrajudicial killing," *Sosa*, 542 U.S. at 728 (*citing* H.R. Rep. No. 102-367, pt. 1, at 3 (1991)), and that this statutory enactment provides "authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." *Id.* Because of the explicit congressional authorization through the TVPA of claims based on torture and extrajudicial killing, the claims brought by and the judgment obtained by the Class of Human Rights Victims in the present case did not present "the possibility that judges may create rights where Congress has not authorized them to do so," which Justice Scalia expressed concern about in his concurring opinion. *Sosa*, 542 U.S. at 747 (Scalia, J., concurring, joined by Rehnquist, CJ., and Thomas, J.).

In *Sosa*, this Court explained that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations," *id.* at 729, confirming that the rule of law has power and importance in U.S. courts and that the independent courts of our country will enforce and apply governing principles of international law. It is also clear that the international community has reached "procedural agreement that universal jurisdiction exists to prosecute" those government officials who commit torture and extrajudicial murder and that providing "universal tort jurisdiction" "will not significantly threaten the practical harmony that comity principles seek to protect." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring). Indeed, in an *amicus curiae* brief filed by the

Republic of the Philippines in 1987 (discussed in more detail *infra*), the Republic explained that:

> The Republic of the Philippines has ... joined forces with other nations of the world to condemn torture and other arbitrary use of force against individuals. The United States has also been at the forefront of this movement. . . . Because all nations have condemned torture and murder under color of law and the United States and the Philippines have worked together to establish the prohibition of torture and murder by governments of their citizens as a peremptory norm of international law, no judge need shy away from examining allegations that these clear principles of law have been violated.

Amicus Curiae Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, Respondent's Appendix (RA) 1, 5-6. It would be a cruel irony if our courts, after acknowledging the legitimacy of claims based on torture and extrajudicial killing, adopted a rule on indispensability that had the effect of making it impossible for victims of human rights abuses ever to collect their judgments.

the Republic of the Philippines – despite its earlier strong support for the case – has opposed their efforts by making claims to whatever assets the Victims identify and pursue.

In *In re Estate of Ferdinand Marcos Human Rights Litigation,* 94 F.3d 539 (9th Cir. 1996), which involved one of the earliest collection efforts, the Ninth Circuit quoted from the Republic's 1987 *amicus* brief, noting that "the Republic's own subsequent actions" were interfering with the efforts of the Human Rights Victims to collect their judgment. *Id.* at 547. The Court of Appeals recognized the irony of this interference and provided a roadmap to the Victims, explaining that the Republic's actions should be interpreted as having "stated that [the Class of Victims] should be permitted to seek damages from *whatever assets the Estate [of Marcos] could establish as its own.*" *Id.* (emphasis added).

The Class of Human Rights Victims is entitled to the assets involved in the present interpleader because they have followed the clear instructions provided by the Ninth Circuit in this previous ruling. The Class has followed this guidance provided by the Court of Appeals and was, in fact, successful in establishing that the assets involved in the present interpleader were "assets of the Estate [of Marcos]," Tr.Ct.Op., Pet.App. at 53a; Ct.Ap.Op., Pet.App. at 10a, as well as their own priority to these assets. Establishing that the Arelma Account was opened by Marcos with his own assets was central to the evidentiary record developed in the present case through

extremely difficult and heavily-contested discovery proceedings which took place in locations around the globe. Lower courts stated explicitly that Marcos *was* the owner of the assets deposited into the Arelma Account and that he remained owner of this Account, until his death, when it became property of his Estate. In its Findings of Fact, the trial court said that "[t]he purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and *there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos*." Tr.Ct.Op., Pet.App. at 53a (emphasis added). The Court of Appeals agreed, saying that "Arelma is a shell corporation . . . and the court may look through the corporate form to *Marcos, the owner of its assets*." Ct.Ap.Op., Pet.App. at 10a (emphasis added).

The Republic has had every opportunity to establish its claim to these assets but has failed to do so in any U.S. or Philippine court. Indeed, the Republic can still try to pursue these assets against Merrill Lynch in a U.S. or Philippine court. But it should not be permitted to overturn a final judgment of a U.S. court based solely on its totally speculative and unsubstantiated assertion that it is entitled to the assets. A dismissal in the present case would only add further delay to this proceeding because any effort by the Republic to assert ownership of the disputed Arelma Account would lead to another interpleader action, which (because of the statute of limitations barring the Republic's claim) would eventually lead once

II. THE CLASS OF HUMAN RIGHTS VICTIMS ARE ENTITLED TO COLLECT ON THEIR JUDGMENT BECAUSE THEY HAVE FOLLOWED THE CLEAR INSTRUCTIONS PROVIDED BY THE NINTH CIRCUIT.

When the Class members first filed their claims against Ferdinand E. Marcos for torture, extrajudicial killing, and forced disappearances, the Republic of the Philippines provided strong support for their efforts and urged the U.S. courts to provide jurisdiction to allow the case to proceed. The U.S. District Court for the District of Hawaii was, in fact, the only venue where the Victims' claim could be filed because Marcos was residing in Honolulu, and this jurisdiction was the only place where personal jurisdiction could be obtained over him. After the district court dismissed their claims based on the act of state doctrine in 1986, the Republic filed a very strong *amicus curiae* brief in 1987, stating that the U.S. courts should "allow Plaintiffs . . . to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court." *Amicus Curiae* Brief Filed in 1987 by the Republic of the Philippines in *Hilao v. Marcos*, No. 15039, RA 1, 1. The *amicus* brief addressed and dismissed the concerns that often underlie the act of state doctrine. It asserted:

> without hesitation or reservation that its foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are

> heard in U.S. courts; and in fact, relations may well be improved if Filipino citizens see that justice is available in U.S. courts. The Philippine Government has previously expressed its deep concern to the U.S. Government about the need for a just solution to the present suits against ex-President Marcos. . . .

Id. at 11 (emphasis in original).

In many situations, a representation made by a party in litigation becomes binding on the party in subsequent phases of the litigation. The Court of Appeals explained in a 2004 ruling that "[a] party (or, in this case, a nonparty) is bound by concessions made in its brief. . . ." *Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) (*citing United States v. Crawford,* 372 F.3d 1048, 1055 (9th Cir. 2004) (*en banc*), *cert. denied,* 543 U.S. 1057 (2005)). In that ruling, the Court of Appeals explained that the Republic was bound by statements it made "in both its briefing and at oral argument" that it was not bound by a conditional settlement agreement entered into between the Class of Human Rights Victims and the Marcos Estate. *Id.* "In view of the Republic's concession that it is not bound by the settlement agreement, its argument for nonparty appellate standing to challenge the same agreement collapses." *Id.*

Since the judgment in favor of the Class became final in 1996, after all appeals were exhausted, the Class members began their efforts to collect on their judgment. This process has been very difficult because

again to a ruling awarding the Account to the Victims.

III. THE UNITED STATES HAS NOT ASSERTED THAT ANY SERIOUS REPERCUSSIONS RELATED TO FOREIGN RELATIONS WILL FOLLOW FROM AFFIRMANCE OF THE RULING BELOW.

The *amicus curiae* brief filed by the United States in this case does not assert that any significant foreign relations difficulties will arise if the rulings below are affirmed. Petitioners' brief likewise fails to identify any significant difficulties that will result from allowing the Victims to collect on their judgment in this litigation, particularly in light of the active efforts by the Republic of the Philippines to utilize U.S. courts to recover assets themselves. Although the Republic clearly knew about the Arelma Account as early as 1986 and utilized U.S. courts to block access to this account in 1987, it thereafter failed to make any effort whatsoever, in either a U.S. or Philippine court, to establish that it is entitled to this Account. Thus, it cannot be said that the Republic's belated interest in the Account will present any difficulties in U.S.-Philippine relations. U.S. courts responded to the wishes expressed by the Republic in its 1987 *amicus curiae* brief when the underlying litigation began, expended substantial judicial resources to allow the litigation to be pursued, and should now apply neutral principles of law to affirm the rulings of the lower courts in the interpleader. In

addition, the views of the Executive Branch are necessarily less relevant when the question is one, as here, concerning the management of court processes and judicial management of cases, rather than the question of whether an underlying claim should be allowed to proceed. The United States, for instance, filed an *amicus curiae* brief in *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (*en banc*), explaining to the court that the act of state doctrine should not be invoked to block litigation by the Republic to collect Marcos's assets. The court relied on that assurance in reaching its conclusion, *id.* at 1360, but, notably, did not follow the recommendations of the U.S. *amicus* brief with regard to the issuance and scope of the injunction, which is more traditionally a matter of judicial management and thus a decision for the independent courts to make. *See id.* at 1370-71 (opinion of Schroeder, J., joined by Canby, J., concurring and dissenting in part, criticizing the majority for evaluating the injunction issue in a manner that was inconsistent with the recommendations of the U.S. *amicus* brief).

Allowing litigants to collect on their judgment against the assets of the tortfeasor is an essential element to the vindication of these principles. Other cases involving both the Republic and the Marcos assets in U.S. courts have not adversely affected United States relations with the Philippines.

IV. COUNTRIES HAVE A CONTINUING OBLIGATION TO PROVIDE COMPENSATION TO VICTIMS OF HUMAN RIGHTS ABUSES, EVEN IF A NEW ENLIGHTENED GOVERNMENT HAS REPLACED THE PREVIOUS DESPOTIC REGIME.

In the present case, the Ninth Circuit explained that the members of the Class were "victims of a rough and rapacious ruler, who often exercised arbitrary power." *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corporation*, 464 F.3d 885, 894 (9th Cir. 2006). And despite the passage of 21 years since Marcos was forced out of office, "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." *Id.*

The Republic's duty to compensate the members of the Class was explicitly recognized by the Swiss Federal Court when it conditionally returned funds in Swiss banks to the Republic, but explained in its opinion that the Philippine government had a duty to compensate the Marcos victims. Indeed, the Swiss Court explicitly referred to the class action brought in the District Court for the District of Hawaii by the present Class of Human Rights Victims. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997), Ex. 47, JA 64, 84-86. It also confirmed that the duty of a successor government to provide compensation to those whose human rights have been abused by a previous government is firmly established in

international law. It based this conclusion on Article 2(3)(a) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, which has been ratified by 160 countries including the Philippines and the United States, and which states that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . .", and on Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), which has also been ratified by the United States and the Republic of the Philippines, and which states that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[4]

Numerous decisions by international tribunals have made it clear that the duty to provide compensation for victims of human rights abuses is a central obligation and is one that continues even after a

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[4] The U.S. assertion that its ratification of the Convention against Torture was accompanied by an understanding that it was obliged only to provide a remedy for those tortured in the United States is undermined by Congress' subsequent enactment of the Torture Victim Protection Act, which was clearly designed to provide a remedy for those tortured outside the United States by officials of their own government.

change of government. The Inter-American Court of Human Rights, for instance, ruled in *The Velasquez Rodriguez Case*, 4 Inter-Am. Ct. H.R. (Ser.C) (1988), *reprinted in* 28 I.L.M. 291 (1989), that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation" and that the duty to compensate the victims of these abuses continues despite "changes of government" even if "the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred." *Id.* at 327-28.

The European Court of Human Rights has ruled similarly in the *Golder Case*, Ser.A, no.18 at 17 (Eur. Ct. H.R., May 7, 1974), that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognized' fundamental principles of law." More recently, in *Mentes v. Turkey* (Eur. Ct. H.R.), 37 I.L.M. 858 (1998), the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possessions, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure." *Id.* at 882.

V. THE ISSUE OF INDISPENSABILITY IN THIS CASE HAS ALREADY BEEN ADDRESSED UNDER THE IMMUNITY EVALUATION ESTABLISHED BY THE FOREIGN SOVEREIGN IMMUNITY ACT.

As this Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Congress enacted the Foreign Sovereign Immunities Act for the purpose of taking the determination of immunity out of the realm of politics and to establish a "comprehensive" "'set of legal standards'" that "'codifies . . . the restrictive theory of sovereign immunity'" and "transfers the primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 691 (*quoting Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This statute was passed for the purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims *and eliminating political participation in the resolution of such claims*." *Id.* at 699 (emphasis added).

Although it is clear that the Republic of the Philippines was entitled to invoke sovereign immunity to avoid participating in this interpleader action, it does not follow that it can use its immunity affirmatively to close down this altogether proper interpleader action. Its rights are preserved, and it can pursue any claim it may have against Merrill Lynch, and it can continue to pursue claims against the Marcoses.

But the Republic should not be permitted to close down this fully litigated interpleader action based solely on its unsubstantiated claim to the disputed

assets. Allowing the Republic to prevail in this proceeding would effectively make it impossible for any human rights victims to collect on their judgments. If U.S. courts were to establish such a rule, the United States would be in violation of its responsibilities to provide an effective forum for human rights victims to use to vindicate their rights.

VI. THE REPUBLIC'S REQUEST IS AN IMPERMISSIBLE AND UNPRECEDENTED DEMAND THAT U.S. COURTS ABSTAIN FROM ANY ACTION IN WHICH A FOREIGN GOVERNMENT ASSERTS AN INTEREST.

This Honorable Court has explained that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). This statement was made in a decision rejecting a claim based on the act of state doctrine, where this Court stated that "[t]he act of state doctrine is not some vague doctrine of abstention." *Id.* at 406. The Court interpreted the act of state doctrine narrowly and explained that this doctrine "does not establish an exception for cases and controversies that may embarrass foreign governments." *Id.* at 409.

Courts should abstain from deciding cases only in rare situations because litigants are entitled to have their claims adjudicated in courts. Certainly, the members of the Class of Human Rights Victims are entitled to have their day in court so they can pursue

collection in a case brought with the encouragement of the Republic, as evidenced by its 1987 *amicus curiae* brief.

Finally, courts must be able to facilitate an end to litigation, and the dismissal sought by the Republic will lead only to duplicative and protracted litigation. As the *amicus curiae* brief filed by Merrill Lynch explains, the Republic will only be able to obtain the disputed Arelma assets by bringing a claim against Merrill Lynch in a U.S. court, which will trigger another interpleader action, leading eventually to another determination in favor of the Victims. Because such an outcome is nonsensical, the rulings below should be affirmed.

CONCLUSION

For the reasons expressed herein, the rulings below in this interpleader action should be affirmed, and the members of the Class of Human Rights Victims should be allowed to collect a portion of their judgment.

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Respectfully submitted,

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